IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 412

ERVIN HOWELL AND RAYMOND EARL GUTERMUTH, *Petitioners*,

v.

ROYDEN O. COUCH, doing business as COUCH MANUFACTURING COMPANY, *Respondent*.

REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI.

Low head pumps for drainage and irrigation, which it seems have been made the subject of the Respondent's affidavit in his opposing brief, are not the subject in this controversy. The so-called two-way or reverse-flow pump is involved herein and its use, according to the Respondent's attempted proofs, is peculiar to the farming conditions found in Florida, particularly the Everglades section. (R. particularly pp. 42 and 45)

Although the invention is entitled in the patent, "Low Head Rotary Pump," all of its advantages have been urged, in this litigation, as flowing from the combination which provides for the reverse flow and the affidavit does not allege that this expedient is used by any of the manufacturers

listed in it, or that there is any infringement of the Respondent's patent outside the State of Florida according to his conception of what it comprehends.

The patent is now nearly ten years old (R. 219) and, so says the Respondent, his invention with its alleged advantages has been known over twelve years. (R. 34) If there has been no use of it other than in Flroida (and the Record does not indicate that there has) there is no likelihood of such use in the future. There is, therefore, no likelihood of future litigation outside the Fifth Judicial Circuit even if the Respondent were disposed to enforce his patent elsewhere. And it is not probable that he would seek to enforce it in the event of such infringement since, from the Record, he is apparently content with the business the State of Florida affords him.

The position of the Petitioners is that the decision of the Fifth Circuit Court of Appeals, of which they complain, is wrong for the reasons fully set out in their petition and the brief which accompanied it, and that, if this Court does not assume jurisdiction and right the matter, the farmers of Florida (and probably other members of the public) will be subject to having imposed upon them the payment of a tribute to the Respondent for the use of something which by Anderson's act, if no other, passed into the public domain before any conception by the Respondent.

Drawing on the Appellate Court's decision for expression, the Respondent in his opposing brief characterizes the Petitioners as imitators. If so, they stand with the Respondent in this respect, for both he and they make, not his patented invention, but the construction made earlier by Anderson and in all probability made earlier still by Dr. Tatom. (R. 136)

It is submitted that the writ of certiorari should be granted.

Ervin Howell,
Raymond Earl Gutermuth,
By Francis G. Boswell,
Counsel for Petitioners.